Osgoode Hall Law Journal

Volume 16, Number 2 (October 1978) Article 8

The Unsworn Evidence of Children and Mutual Corroboration

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THE UNSWORN EVIDENCE OF CHILDREN AND MUTUAL CORROBORATION[1]

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A. INTRODUCTION

The recent case of *Re Morris et al. and Attorney General for New Brunswick*[2] has once again, although in a somewhat different context, highlighted the possible effects of the statutory requirement that the evidence of unsworn children be corroborated. Unfortunately, statistics are not available of the number of criminal offences where the victim or victims are young children.[3] However, it is reasonable to assume that the number of crimes

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[1] Mutual corroboration may be defined as follows: the evidence of A being corroborated by the evidence of B which itself requires corroboration and is corroborated in turn by the evidence of A.

Articles in which other aspects of the evidentiary problems surrounding the evidence of children are discussed include Ian Cartwright, *The Prospective Child Witness* (1963-64), 6 Crim. Law Q. 196; C. C. Savage, *Corroboration in Sexual Offences* (1963-64), 6 Crim. Law Q. 282; S. Tupper Bigelow, *Witnesses of Tender Years* (1966-67), 9 Crim. Law Q. 298, Keith Turner, Q.C., *Children in Court* (1962), 1 Man. Law School J. 23; Perry W. Schulman, *The Law and the Minor* (1970), Issac Pitblado Lectures on Continuing Leg. Ed. 86.

Articles dealing generally with the subject of corroboration include Keith Turner, Q.C., *Corroboration* (1970), Isaac Pitblado Lectures on Continuing Leg. Ed. 58; C. C. Savage, *Corroboration* (1963-64), 6 Crim. Law Q. 187; A. F. Sheppard, *Mutual Corroboration* (1972-73), 15 Crim. Law Q. 62.

[2] (1975), 63 D.L.R. (3d) 337 (N.B.C.A.).

[3] Unpublished *Report on Child Molesting* submitted by the Sub-committee on Child Molesting in June, 1977, to Mayor Mel Lastman of North York's Committee on Child Abuse does, however, give us some indication of the scope of the problem. The statistics for North York alone in 1976 are found at 1-2:

> There were 83 cases of sexual assaults involving juveniles under 16, and only 35 arrests. There were 4 rapes and 2 attempted rapes of girls under 14 and 15 years old; 1 charge of incest; and 4 cases of sexual intercourse with a female under 14 years (a charge similar to statutory rape or carnal knowledge in other countries). All these cases were solved, 8 men were arrested, 2 were cautioned and one man escaped out of the country.
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> The 72 cases of indecent assault (involving 59 girls, between 3 and 15 and 13 boys between 4 and 15) showed less encouraging outcomes. One third of the cases remain unsolved (46% for the boys, 31% unsolved for the girls).
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> The overall percentage of arrests was 39% and of cautions 28%. This breaks down to 2 arrests (15%) and 5 cautions (38%) for the indecent assault on a male and 26 arrests (4%) and 15 cautions (25%) for indecent assault on a female.

against young children has increased at approximately the same rate in the last fifteen years as all other crimes of violence. It is suggested that the result of the requirement that the evidence of unsworn children be corroborated must surely be that an ever-increasing number of such offenders will be able to avoid conviction.

The issue of corroboration in the case of *Re Morris* arose on the application of an infant complainant for compensation pursuant to *The Compensation for Victims of Crime Act*[4] rather than on a criminal charge. The applicant M, who was six years of age, testified without being sworn that she had been proceeding to the playground when a number of adolescent boys came running down a hill, caught her, pulled her up the hill, covered her face with a jacket, and set her on fire.[5] As a result of this violent incident M had to be hospitalized for six weeks and had to undergo prolonged medical treatment and skin grafting.[6] The only other direct evidence of this incident was the unsworn testimony of the applicant's younger brother.

One of the issues before the New Brunswick Court of Appeal was whether the unsworn evidence of the complainant could be corroborated by the unsworn testimony of her brother. This required the court to interpret section 24 of *The Evidence Act*[7] of New Brunswick which provides:

> (1) Where in an action a child of tender years is tendered as a witness, and the child does not in the opinion of the court understand the nature of an oath, the evidence of the child may be received though not given upon oath, if in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
> (2) No action shall be decided upon the evidence of a child of tender years given under authority of this section unless such evidence is corroborated by some other material evidence.

The court was of the opinion that the words "some other material evidence" in section 24(2) of *The Evidence Act* prohibited an action being decided upon only the unsworn evidence of children. The words "some other material evidence," it was held, referred to evidence admitted other than by virtue of the section, which evidence would itself require corroboration. The only case cited in support of this interpretation of the statutory provision in question was the case of *R.* v. *Manser,*[8] a case which, as will be shown, has

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The outcome of these trials are unknown, but conviction rates are notoriously low. Thus a very small percentage of some 39% of the known offenders — perhaps 5 to 20% — will actually be punished, but child molesting is a hidden crime. The reported cases represent only the tip of the iceberg. In reality the percentage of offenders to actually face the consequencs of their actions is considerably lower.

[4] R.S.N.B. 1973, c. C-14.

[5] *Supra,* note 2 at 338.

[6] *Id.* at 339.

[7] R.S.N.B. 1973, c. E-11.

[8] (1934), 25 Cr. App. R. 18.

had a somewhat checkered history. Since, as has already been pointed out, the only direct evidence of the incident in *Re Morris*[9] was the unsworn evidence of the applicant and her younger brother, the appeal was dismissed. It should be noted that the Court of Appeal reached this conclusion in spite of the statement of the judge at the initial hearing that he had been impressed by the two children, found them to be intelligent and the applicant's younger brother, in particular, "a bright, keen young lad."[10] The judge, nevertheless, concluded that both children did not understand the nature of the oath and, in the end, this conclusion turned out to be the most critical finding of the judge.

B. POLICY CONSIDERATIONS

Generally speaking, in the common law world a court may act upon the uncorroborated testimony of one witness.[11] This area of the law of evidence may be contrasted to the position in many civil law jurisdictions. Nonetheless, there are certain situations in which it has been considered dangerous to act on the uncorroborated evidence of one witness, such as affiliation proceedings, perjury, and proceedings arising out of some sexual offences.

The evidence of children is rightly treated with some suspicion. The suspicion, however, has been based for the most part on the untested assumptions that "immaturity, possible errors in perception, the comparative ease with which their impressions may be magnified or distorted or influenced by what may be said to them"[12] render the evidence of children more suspect than the evidence of adults.

It is only in recent years that the assumptions mentioned above have been scientifically tested. For example, studies[13] have shown that children are inferior to college students in a test involving the recall of a list of unrelated words. On the other hand, it has been suggested that it would be inappropriate to generalize from such studies, which require strategies for encoding or organization, that all types of evidence proffered by children would be less reliable than the evidence of adults. Indeed, experiments which have been conducted show that there is little, if any, difference between children and adults with respect to memory for events, such as those presented on

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[9] *Supra*, note 2.

[10] *Id.* at 344.

[11] Sir Rupert Cross, *Evidence* (London: Butterworth and Co., Ltd., 1974) at 168.

[12] J. A. Andrews, *The Evidence of Children*, [1964] Crim. Law Rev. 769.

[13] E. Neimark, N. S. Slotnick, and T. Ulich, *Development of Memorization Strategies*, 1971, 5 Developmental Psychology 427 at 427-432; J. H. Flavell, A. Freidrich, and J. Hoyt, *Developmental Changes in Memorization Process* (1970), Cognitive Psychology 324 at 324-340; T. Scribner and M. Cole, *Effects of Constrained Recall Training on Children's Performance in a Verbal Memory Task* (1972), 43 Child Development 843 at 843-857; J. Belmont and E. Butterfield, *What the Development of STM is* (1971), 4 Human Development 236 at 236-248.

film,[14] which suggests that there is no good experimental evidence for not treating children as reliable witnesses.

In another study, subjects were shown a film containing two incidents of theft judged to be somewhat similar to the kind of situation often explored in a courtroom. Following the film, subjects were asked various suggestive and non-suggestive questions. The subjects were a mix of grade three students, grade six students, and college students. One week after their initial questions the same questions were put to the subjects by a different examiner. The conclusions drawn were as follows:

> The data show that young children appear more susceptible to suggestion than they really are, and that the testimony of child witnesses questioned in the usual manner may not be reliable in that this apparent suggestibility is accepted at face value. The data suggest that children know more than they are able to articulate, and that they tend to accept suggestions put to them, while actually retaining many accurate facts. Profound alterations in the present methods of receiving child testimony are necessary if we wish to gain access to a child's knowledge of the facts.
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> The fact that Grade 6 and college students perform at nearly the same level under both conditions of questioning would seem to suggest that children of this age are no more affected by suggestion, and no less able to remember the relevant facts than are adults.
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> In sum, it appears that older children (Grade 6's) are equal to adults in their ability to remember, and in their ability to resist suggestion, and in this respect should be regarded as equally reliable courtroom witnesses. Experimental evidence does however suggest that present methods of questioning are probably not suitable for younger children.[15]

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[14] R. L. Cohen, *Children's Testimony and Mediated (Hearsay) Evidence* (unpublished paper prepared for the Canada Law Reform Commission).

Professor Cohen's experiment involved children aged nine to eleven years and ten university students. Each group viewed a film, were asked to give a very general description of the film just after viewing and were asked a set of twenty questions five days after having seen the film. The table below provides the results of the experiment conducted by Professor Cohen:

TABLE

Mean percentage correct responses given by adult and child subjects.

	ADULTS	CHILDREN
Subjective QS	92.7%	81.3%
Objective QS	78.5%	71.4%

[15] M. A. Harnick, *Child Witnesses: Memory and Suggestibility,* Senior Thesis submitted to Department of Psychology, Glendon College, York University (unpublished). The findings of Harnick are illustrated by the following tables:

TABLE 1

Initial cued recall test for non-suggestive questions
Mean proportion of responses correct

GRADE THREE STUDENTS	GRADE SIX STUDENTS	COLLEGE STUDENTS
.51	.76	.79

TABLE 2

Mean proportion of responses in the direction of the false suggestion in cued recall

GRADE THREE STUDENTS	GRADE SIX STUDENTS	COLLEGE STUDENTS
.82	.36	.24

These findings may be considered to be sufficient reason for a requirement that a special warning be given to the triers of fact about the dangers of acting on only such evidence. The question remains, however, whether these factors, when weighed against other considerations, are of sufficient importance to necessitate the complete neutralization of such evidence when no sworn testimony is available for the purpose of corroboration. It is submitted that ignoring such evidence is to ignore strong policy considerations which suggest that such evidence should be allowed to go to the triers of fact and that the triers of fact should be left to determine the weight to be given it.

First, ignoring the unsworn evidence of children when no other corroborating evidence is available may endanger the lives and safety of young children unnecessarily. "It must be admitted ... that if the law sets itself firmly against convictions in any case where reliance has to be placed wholly or substantially on children's evidence, very many offences against children will go unpunished."[16]

Often such children are the only witnesses to an offence, and to continue to follow the thinking found in the *Morris*[17] decision may only result in guaranteeing impunity to the assaulters of young children who most successfully avoid adult apprehension at the time of the commission of the offence.[18]

Second, the present state of the law puts unnecessary emphasis on the oath at a time when the importance of the oath has been under critical examination and challenge. Indeed, the Evidence Code which the Law Reform Commission of Canada has proposed has eliminated the oath.[19] The abolition of the oath, in addition to other reforms suggested by the Proposed Code,[20] would have the effect of doing away with the requirement of corro-

TABLE 3

Mean proportion of responses correct in the recognition test for items probed with suggestive and non-suggestive questions in initial cued recall

	GRADE THREE STUDENTS	GRADE SIX STUDENTS	COLLEGE STUDENTS
Recognition Suggestive	.49	.67	.72
Recognition Non-suggestive	.76	.90	.87

[16] *Supra*, note 12 at 770.

[17] *Supra*, note 2.

[18] See *supra*, note 12 at 773.

[19] Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975). Section 50 of the Proposed Code provides as follows:

> Before testifying, every witness shall affirm:
> "I promise to tell the truth. I am aware that if I tell a lie or willfully mislead the court I am liable to be prosecuted."

[20] Section 89 of the Proposed Code which provides for the repeal of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 and the repeal of s. 586 of the *Criminal Code*, R.S.C. 1970, c. C-34, will be discussed below.

boration by sworn testimony and would result in the evidence of all children being treated equally.[21]

As has been noted, there are tests set out by statute[22] for determining whether a child of tender years should be permitted to give sworn or unsworn testimony. In order to give sworn testimony the child must "understand the nature of the oath." A child may give unsworn testimony if he or she is of sufficient intelligence to justify reception and understands the duty of speaking the truth. It is submitted that in light of recent cases, such as *R.* v. *Dinsmore*,[23] the distinction between these two tests has all but disappeared.

The Ontario Law Reform Commission reports that the determination of whether a child "understands the duty to speak the truth" would appear to be answered in determining whether a child "understands the nature of the oath," that is to say, the moral obligation to tell the truth.[24] If, as the Ontario Law Reform Commission suggests, there is little or no difference between the two tests, one must wonder whether different rules of evidence with respect to the question of mutual corroboration should exist for the unsworn and sworn evidence of children. Why should the law allow the sworn testimony of a child to be corroborated by unsworn testimony of another child, while the evidence of an unsworn child cannot be corroborated by the same sort of evidence?

Third, the present law may also give rise to some anomalous results just as had been the case in respect of sworn and unsworn evidence and the prohibition against their possible mutual corroboration.[25] Let us take the case of three children, all of tender years, playing together. Two of the children are approached and indecently assaulted by a man, while the third child goes unmolested. At trial the two children who were assaulted both give unsworn evidence of the offence, while the third child (who has been approached by the accused about his testimony) gives evidence under oath on behalf of the accused. The evidence of the two children, although clearly

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[21] See s. 13 of the *Oaths and Declarations Act, 1957*, (1908-1957) 11 N.Z. Statute Reprint which provides as follows:

> Witness under twelve may make declarations — All witnesses under the age of twelve years may in any judicial proceedings be examined without oath; but any such witness shall be required, before being so examined, to make the following declaration: "I promise to speak the truth, the whole truth, and nothing but the truth"; and that declaration shall be of the same force and effect as if the witness had taken an oath.

[22] For example, s. 24(1) of *The Evidence Act*, R.S.N.B. 1973, c. E-11, and s. 16(1) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10.

[23] [1974] 5 W.W.R. 121 (Alta. S. Ct.). As a result of the decision of McDonald J. in this case, it can be argued that it is sufficient for a child of tender years to show merely "an understanding of the moral obligation to tell the truth" in order to be able to give evidence under oath. Since this test is quite similar to part of the test used to determine whether a child may give unsworn testimony — "understands the duty of speaking the truth" — it would seem that there would be no child who will be able to satisfy the latter test who does not also satisfy the former test.

[24] Ontario Law Reform Commission, *Report on Evidence* (Toronto: Ministry of the Attorney General, 1976) at 127.

[25] *Supra*, note 12 at 776.

admissible under section 16(1) of the *Canada Evidence Act*[26] would have to be ignored if the decision of *Re Morris*[27] were followed; on the other hand, the case could be decided upon the evidence of the third child simply because the trial judge concluded that this child "understood the nature of the oath." The third child may even give unsworn evidence which could be corroborated by the accused. In such a case, the triers of fact would have to be instructed to ignore the evidence of the complainants while full weight and effect could be given to the testimony of the third youngster.[28]

It is also interesting to look at Rule 331(2) of the Ontario *Rules of Practice*[29] which provides as follows:

> Where a child of tender years does not understand the nature of an oath, he may nevertheless be examined for discovery if possessed of sufficient intelligence to be examined and if he understands the duty of speaking the truth, but his examination shall not be used as evidence at the trial pursuant to rule 329 unless otherwise ordered by the trial judge.

It would appear that the wording of Rule 331(2) might allow the unsworn evidence of a child to be used whether there is corroboration or not. This situation would obviously conflict with section 19(2) of *The Evidence Act*[30] of Ontario which provides that "no case shall be decided upon such evidence unless it is corroborated by some other material evidence."

Finally, it is suggested that there does not appear to be any reason why the prosecution in a case involving young children could not choose to wait a few years before commencing proceedings to ensure that the young witness will be allowed to take the oath, thereby making corroboration unnecessary.[31] Thus, it could be argued that the present law encourages delays in the prose-

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[26] R.S.C. 1970, c. E-10.

[27] *Supra*, note 2.

[28] It is also worthy of note that s. 16(2) of the *Canada Evidence Act* speaks of "no case being decided" upon the unsworn evidence of a child, while s. 586 of the *Criminal Code* provides that "no person shall be convicted" of an offence upon the unsworn evidence of a child without such evidence being corroborated. Does the wording of s. 586 permit an acquittal based on the uncorroborated unsworn evidence of a child? Surely this possibility should not be allowed to exist.

[29] *Ontario Annual Practice 1977* (Toronto: Canada Law Book Ltd., 1977).

[30] R.S.O. 1970, c. 151.

[31] In the case of *R.* v. *Kendall* (1962), 132 C.C.C. 216 (S.C.C.), it was held that no special warning to the jury was necessary in the case of witnesses giving evidence of events that had occurred nine years before the trial when they were children aged twelve, ten and eight. Judson J. at 220-21 stated as follows:

> The basis for the rule of practice which requires the Judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility. (Wigmore on Evidence, 3rd ed. para. 506).
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> The last point, a sense of moral responsibility, disappears when the children are of mature years and understand the duty to speak the truth. When these children gave evidence they were respectively 21, 19 and 17 years of age. They were in the same position at that age as any other witness . . . . Questions of weight and credibility in these circumstances were entirely for the jury.

cution of such offenders. Moreover, it should be noted that it has been held that there is absolutely nothing wrong with instructing a young child before the trial on the subject of the nature and meaning of the oath to ensure the giving of sworn testimony.[32]

Whether or not one feels that the policy considerations discussed above suggest that the decision of the Court of Appeal in *Re Morris*[33] was the incorrect one, it is submitted that there is no legal precedent compelling such a conclusion. Although the question of mutual corroboration and the unsworn evidence of children has been discussed in a number of cases, both English and Canadian, it is the opinion of the writer that the matter has not been dealt with conclusively and the Court of Appeal in *Re Morris* was free to weigh the various policy considerations for and against mutual corroboration. Had the Court of Appeal dealt with the matter in this fashion, the conclusion of the court, whatever it might have been, would have been more palatable to the complainant, in particular, and to the public, in general.

C. THE CASES

As was pointed out above, the Court of Appeal in *Re Morris* relied on the earlier case of *R.* v. *Manser*[34] in arriving at its conclusion. Interestingly, the House of Lords had overruled the *Manser* decision just some two years prior to the case of *Re Morris*, yet the case of *D.P.P.* v. *Hester*[35] does not appear to have been cited either on the initial application or on the appeal thereof. However, it should be pointed out that the *Hester* case, while it did overrule the *Manser* decision, did so in such a way that the decision of the Court of Appeal in *Re Morris* (that the unsworn testimony of one child could not corroborate the unsworn testimony of another child) could still stand. Therefore, it would seem appropriate at this point to turn our attention to the decision of the House of Lords in *Hester*.

The accused in that case had been charged with three counts of indecent assault on a girl twelve years of age, contrary to section 14(1) of the *Sexual Offences Act, 1956*.[36] At trial the accused had been acquitted on the first two counts but convicted on the third count. The evidence before the court on this third count consisted of the testimony of the complainant, who testified under oath, and her younger sister, who was only nine years of age and gave unsworn testimony. The accused appealed his conviction on the ground that the deputy chairman had misdirected the jury in instructing them that the evidence of an unsworn child can in law amount to corroboration of evidence given on oath by another child.[37]

The Law Lords unanimously agreed that the direction given by the

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[32] *R.* v. *Armstrong* (1907), 12 C.C.C. 544 (Ont. C.A.); *R.* v. *Brown* (1951), 99 C.C.C. 305 (N.B.C.A.).

[33] *Supra*, note 2.

[34] *Supra*, note 8.

[35] [1973] A.C. 296; [1972] 3 All E.R. 1056; [1972] 3 W.L.R. 910 (H.C.).

[36] 4 & 5 Eliz. 2, c. 69.

[37] *Supra*, note 35 at 308 (A.C.); 1058 (All E.R.); 912 (W.L.R.).

deputy chairman was correct in law. Not only did the Law Lords agree that the evidence of an unsworn child could corroborate the evidence given by another child under oath, but they also concluded that the sworn evidence so corroborated could in law provide the corroboration required by section 38(1) of the *Children and Young Persons Act, 1933*[38] with respect to the unsworn evidence of a child. In order to reach the latter conclusion, the House of Lords had to overrule the case of *Manser* which they found to be identical on its facts to the case at bar, rather than a case involving the unsworn evidence of two children as the Court of Appeal in *Re Morris* had assumed.[39]

Until the decision of the House of Lords in *Hester*, the *Manser* case had been cited as authority for the proposition that the unsworn evidence of one child could not constitute corroboration of the unsworn evidence of another child, nor could such evidence be mutually corroborative.

The House of Lords in *Hester*, however, preferred to follow the *dicta* of Lord Goddard in *R.* v. *Campbell*.[40] That case involved seven counts of indecent assault on boys under the age of sixteen, each of the boys being about ten years of age. The corroborative evidence in the case was of two different kinds: on some of the counts one of the boys named as the assaulted person in a count of the indictment gave evidence that he had seen the accused commit a similar or substantially similar act to that of which he complained on another boy named in another count; on the other counts, there was the evidence of some boys and girls (who also gave sworn evidence), not involved in any of the charges brought against the accused, that they had seen the accused act in relation to some of the boys in a manner which was alleged to constitute an indecent assault. On appeal the accused claimed that the deputy chairman had erred in holding that the evidence of those children not involved in any of the assault could amount to corroboration of the evidence of the complaining children. Lord Goddard, in dealing comprehensively with the law as regards the evidence of children, stated as follows:

> To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned not that they must find corroboration but that there is a risk in acting on the un-corroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate

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[38] 23 & 24 Geo. 5, c. 12.

[39] The report of the *Manser* case does not make it clear as to whether the case is one concerning the unsworn evidence of one child and the sworn evidence of another child. The law Lords concluded that the case should be treated as one involving sworn and unsworn evidence. See *supra*, note 35 at 313 (A.C.); 1063 (All E.R.); 917 (W.L.R.) *per* Lord Morris of Borth-y-Gest; at 319 (A.C.); 1068 (All E.R.); 923 (W.L.R.) *per* Viscount Dilhorne; at 324 (A.C.); 1072 (All E.R.); 927 (W.L.R.) *per* Lord Diplock; at 331 (A.C.); 1078 (All E.R.); 934 (W.L.R.) *per* Lord Cross. See also *R.* v. *E.*, [1964] Crim. Law Rev. 302.

[40] [1956] 2 Q.B. 432; [1956] 2 All E.R. 272 (C.A.).

> the evidence either of another child, sworn or unsworn or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given. As proper warnings were given by the learned deputy chairman in this case there is no ground on which we can interfere with the conviction.
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> As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with children where the evidence of each child deals only with the assault on him or herself. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is not corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R.* v. *Sims*, [1946] 1 All E.R. 697, subsequently approved on this point by the House of Lords in *Harris* v. *Public Prosecutions Director*, [1952] 1 All E.R. 1044, shows that such evidence can be given to rebut the defence.[41]

Although the *Hester* decision sounded the death-knell of the prohibition against mutual corroboration in so far as cases involving the unsworn and sworn testimony of children are concerned,[42] it appears to give new life to the prohibition against mutual corroboration in cases of only unsworn evidence of children.[43] All of the law Lords were clearly of the opinion, although

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[41] *Id.* at 438 (Q.B.); 276 (All E.R.).
For some recent cases dealing with the question of similar fact evidence and the evidence of children see *D.P.P.* v. *Kilbourne*, [1973] A.C. 729; [1973] 1 All E.R. 440 (H.L.) and *D.P.P.* v. *Boardman*, [1975] A.C. 421; [1974] 3 All E.R. 887 (H.L.) and see also Robert Thoresby, *Evidence-Corroboration—Wider Still and Wider* (1973), 32 Camb. Law J. 190.

[42] Cases which have permitted "mutual corroboration" include *R.* v. *Cowpersmith*, [1946] 1 W.W.R. 596 (B.C.C.A.) and *R.* v. *Hamlin*, [1929] 3 W.W.R. 258; 24 Alta. L.R. 296; 52 C.C.C. 149; [1930] 1 D.L.R. 497 (C.A.). In the latter case the accused was charged under s. 301 of the *Criminal Code*, R.S.C. 1927, c. 36, and it was held that evidence admitted by virtue of s. 1003 of the Code or s. 16 of the *Canada Evidence Act*, R.S.C. 1927, c. 59, is evidence for the purpose of corroboration of the sworn evidence of a child. In the former case, Sydney Smith J.A. concluded that the unsworn evidence of a child can corroborate the evidence of a child whose evidence is not required by statute to be corroborated. Referring to s. 1003 of the *Criminal Code*, R.S.C. 1927, c. 36, Sydney Smith J.A. stated as follows:

> It does not say that the evidence in corroboration, if itself unsworn, must be corroborated. In other words unsworn testimony standing alone is not sufficient to convict, but there is not prohibition in the use of unsworn testimony for corroboration purposes.

Sydney Smith J.A. treated the *Manser* decision as one concerned with only unsworn evidence. Both O'Halloran and Bird JJ.A. held that there was evidence other than the unsworn evidence of a child which could corroborate the evidence of the complainant. *Cf. R.* v. *Perensky and Smith*, [1950] 1 W.W.R. 1090; 10 C.R. 62; 96 C.C.C. 397 (Alta. S.C.) and *R.* v. *Duguay*, [1966] 3 C.C.C. 266; 48 C.R. 198 (Sask. C.A.). In the former case, Boyd McBride J. held that the unsworn evidence of a child did not constitute corroboration of the evidence of accomplice while in the latter case, Culliton C.J.S. concluded that the sworn evidence of one child could not be corroborated by the unsworn evidence of another child.

[43] Prior to the *Hester* decision the only other English decision on point was the case of *R.* v. *Coyle*, [1926] N.I. 208.

obiter dicta,[44] that the unsworn testimony of one child could not corroborate the unsworn evidence of another child in accordance with the requirements of section 38(1) of the *Children and Young Persons Act, 1933*.[45] Their conclusion was based, however, not on some general rule of the common law, but rather on the particular language of section 38(1) which reads in part as follows:

> Where, in any proceeding against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; . . . Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

The language used in section 38(1) must, therefore, be compared with the language of section 24 of *The Evidence Act*[46] (N.B.), section 16 of the *Canada Evidence Act*,[47] and section 586 of the *Criminal Code*,[48] the latter two statutory provisions (and their predecessors) having been the subject of a substantial amount of judicial comment.[49]

The earliest decisions concerning the requirement of corroboration under either section 16 or section 586 would appear to be the cases of *R.* v. *Pailleur*[50] and *R.* v. *Iman Din*.[51] In the former case the accused had been charged with and convicted of attempting to commit the offence of incest with his daughter who was about seven or eight years of age. The evidence of the daughter and another child four years of age was received by the court but not upon oath. A majority of the Court of Appeal concluded that there was sufficient evidence, other than the testimony of the two children themselves, which could corroborate the children's evidence. None of the justices raised the issue of mutual corroboration.

In the case of *Iman Din* the issue was canvassed by some of the members of the court, but does not appear to have been resolved one way or the other, the court having been evenly divided on the question. Martin J.A., with whom Galliher J.A. agreed, said of section 16(2) of the *Canada Evidence Act*:

> All that the second sub-section declares is that "no case shall be decided upon

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[44] It has been suggested that the conclusions of the law Lords with respect to the *Manser* decision may also be *obiter dicta*. See R. N. Gooderson, *Evidence-Corroboration of Child by Unsworn Child* (1973), 32 Camb. Law J. 39.

[45] 23 & 24 Geo. 5, c. 12.

[46] R.S.N.B. 1973, c. E-11.

[47] R.S.C. 1970, c. E-10.

[48] R.S.C. 1970, c. C-34.

[49] See also *The Evidence Act*, R.S.O. 1970, c. 151, s. 19; *The Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 21; *Evidence Act*, R.S.B.C. 1960, c. 134, s. 6, *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 26; *The Saskatchewan Evidence Act*, R.S.S. 1965, c. 80, s. 40.

[50] (1910), 20 O.L.R. 207; 15 C.C.C. 339 (C.A.).

[51] (1910) 16 W.L.R. 130; 15 B.C.R. 476; 18 C.C.C. 82 (C.A.).

> such evidence alone," and such evidence must be corroborated by some other "material evidence." There is, in these words, no suggestion that the "material evidence" may not be given by a witness whose evidence, as declared by the preceding sub-section, "may be received though not given upon oath," subject to the opinion of the presiding Judge. The limitation respecting corroboration clearly does not extend to the secondary witness.[52]

Section 16 reads as follows:

> (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

Two other justices concluded that the evidence of the complainant had not been corroborated. It might be suggested that these two justices were addressing themselves not to the question of whether the children's evidence could be mutually corroborative, but rather to the substance of the evidence. In any event, it seems clear that neither the case of *R.* v. *Pailleur* nor the decision of *R.* v. *Iman Din* could be said to have resolved the issue of mutual corroboration in the case of unsworn evidence of children.

Only a few years after these two cases were decided the Alberta Court of Appeal was confronted with the same problem. In *R.* v. *Whistnant*[53] the accused was charged with and convicted of the assault of a child twelve years of age. The conviction was appealed on the ground that the evidence of the complainant had not been corroborated as required by section 1003 of the *Criminal Code*[54] which provided in part as follows:

> (1) Where upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and ninety-two for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
> (2) No person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

The only witness other than the complainant to give direct evidence of the alleged offence was the complainant's nine year old sister, who testified with-

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[52] *Id.* at 138 (W.L.R.); 481-482 (B.C.R.); 86-87 (C.C.C.) *per* Macdonald J.A. See also *R.* v. *McInulty* (1914), 6 W.W.R. 315 at 316; 19 B.C.R. 109 at 110; 22 C.C.C. 347 at 348; 16 D.L.R. 313 at 314 (B.C.C.A.).

[53] (1912), 3 W.W.R. 486; 5 Alta. L.R. 211; 20 C.C.C. 322; 8 D.L.R. 468 (C.A.).

[54] R.S.C. 1906, c. 146.

out taking the oath. Although the court said that there was other evidence which could corroborate the unsworn testimony of the complainant, the court, nevertheless, expressed the opinion "that the evidence of the sister is not such corroboration as the section requires."[55] The Chief Justice remarked that "no matter how many children gave evidence under that section, their total evidence would be testimony under that section, and therefore, would require corroboration."[56]

It would appear, therefore, that the reasoning of the court was based on a statutory interpretation of section 1003. The language of that section should be carefully compared to the present section 586 of the *Criminal Code*.[57] The difference in the language employed in the two sections, it is suggested, is of crucial importance and would appear to buttress the argument that the unsworn evidence of children can now be mutually corrorborative. Section 1003(2) specifically states that no person shall be convicted of any of the offences mentioned in section 1003(1) "unless the testimony *admitted by virtue of this section* . . . is corroborated by some other material evidence . . . ." Section 1003(2) would seem to expressly cover any and all evidence admitted by virtue of the preceding sub-section, just as is the case with section 38 of the *Children and Young Persons Act*.[58] Section 586, on the other hand, provides only that "no person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused." The section speaks only of the individual child rather than any and all evidence admitted by virtue of some other section of that Code. Moreover, the use of the words "in a material particular" would suggest that the corroboration referred to may be sworn or unsworn evidence as long as the evidence satisfied the *qualitative* requirement of section 586. It is suggested that the change in language from section 1003(2) to section 586 was made by Parliament with the intention of alleviating the possible draconian results of section 1003. Unfortunately, the difference in language has not been the subject of judicial comment to date.

Unlike the comments of Harvey C.J. in *Whistnant*[59] which were clearly *obiter dicta*, the conclusions of the justices in *R.* v. *McInulty*[60] were crucial to the result reached by the court. On a stated case to the Court of Appeal it was unanimously held that neither under section 1003 of the *Criminal Code*[61] nor under section 16 of the *Canada Evidence Act*[62] could there be corroboration of unsworn testimony of one child by similar unsworn testi-

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[55] *Supra*, note 53 at 486 (W.W.R.); 212 (Alta. L.R.); 323 (C.C.C.); 469 (D.L.R.).

[56] *Id.* at 487 (W.W.R.); 212 (Alta. L.R.); 324 (C.C.C.); 470 (D.L.R.). See also similar comments in *R.* v. *Coyle*, *supra*, note 43; *R.* v. *McInulty*, *supra*, note 52; *D.P.P.* v. *Hester*, *supra*, note 35.

[57] R.S.C. 1970, c. C-34.

[58] 23 & 24 Geo. 5, c. 12.

[59] *Supra*, note 53.

[60] *Supra*, note 52.

[61] R.S.C. 1906, c. 146.

[62] R.S.C. 1970, c. E-10.

mony. The comments in relation to section 1003 are *obiter*[63] but the conclusion with respect to section 16 must be seen as the *ratio decidendi* of the case.

All of the members of the court were of the opinion that the words "such evidence" in section 16(2) referred to any evidence given in accordance with section 16(1) rather than the evidence of a particular child.[64] However, it may be argued that the words "such evidence" and "some other material evidence" rather than requiring that corroboration be in the form of sworn testimony simply refer to a qualitative requirement, as suggested above in relation to section 586 of the *Criminal Code.*

The *McInulty* case has been followed in a number of cases to date,[65] but perhaps the most persuasive authority in which that case has been approved is the case of *Paige* v. *The King.*[66] One of the questions to be decided by the court in that case was whether the corroboration required by section 301 of the *Criminal Code*[67] could be furnished by the unsworn testimony admitted by section 16 of the *Canada Evidence Act.*[68] Section 301(2) provided as follows:

> Everyone is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen years, not being his wife, and whether he believes her to be above age of sixteen years or not; but no person accused of any offence under this sub-section shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The court unanimously concluded that the unsworn evidence of a child admitted under section 16 could not constitute the corroboration required under section 301(2).

Rand J. stated that the word "evidence" in section 301(2) required that the corroborative evidence possess the "essential sanction"; in other words, the evidence must be evidence under oath.[69] It is suggested that no such requirement is expressed in or can be read into section 301(2). Rand J., relying on *R.* v. *Manser,*[70] rejected the conclusion of the trial judge because it was a circular argument.

> [T]he fallacy involved is perfectly obvious; it would mean that the evidence of the prosecutrix which must be corroborated by testimony formally complete can itself

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[63] *R.* v. *McInulty, supra,* note 52 at 315, 317 (W.W.R.); 110 (B.C.R.); 347, 349 (C.C.C.); 314, 315 (D.L.R.).

[64] *Id.* at 317 (W.W.R.); 112 (B.C.R.); 349 (C.C.C.) 315 (D.L.R.) *per* Irving J.A. The court sitting on the appeal included Galliher J.A. who had been of the opinion in *R.* v. *Iman Din, supra,* note 51, that the unsworn evidence of one child could corroborate the unsworn evidence of another child.

[65] *R.* v. *Lamond* (1925), 58 O.L.R. 264; 29 O.W.N. 297; [1926] D.L.R. 826; 45 C.C.C. 200 (C.A.).

[66] [1948] S.C.R. 349.

[67] R.S.C. 1927, c. 36.

[68] R.S.C. 1970, c. E-10.

[69] *Supra,* note 66 at 355.

[70] *Supra,* note 8.

> be used to corroborate imperfect testimony necessary to its own corroboration; that it can be used, in other words, to corroborate its own corroboration.[71]

Estey J., with whom the other members of the court agreed, also relying on *Manser*, commented as follows:

> Such independent evidence must possess probative value which is the very quality section 16 denies to the unsworn and uncorroborated evidence of a child of tender years. Such is the effect of the specific provision that "such evidence must be corroborated." It follows that if it is not corroborated it does not possess probative value and should be ignored.[72]

It is suggested that there is nothing in section 16 to indicate that the evidence admitted pursuant to that section has no probative value unless corroborated.[73] The admissibility of such evidence is not conditional upon corroboration.[74] Certainly, the effect of that section, if the *McInulty*[75] decision is followed, might be that the evidence admitted thereunder may have to be ignored, but the evidence of a child admitted under section 16(1) is, nevertheless, just as much evidence as that given under oath. Moreover, it is now clear that the "circular argument" rejected by Rand J. in *Paige* v. *The King*[76] is the law and that unsworn testimony may corroborate sworn testimony and vice versa.[77]

The issue of mutual corroboration of the unsworn evidence of children has been the subject of comment in a number of other cases, but there is no real discussion of the issue; rather, reliance is placed upon one or more of the cases discussed above.[78] Therefore, it would appear that the only case in which a court has had to discuss and determine the question of whether the unsworn evidence of children can be mutually corroborative is the *McInulty*[79]

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[71] *Supra*, note 66 at 355.

[72] *Id.* at 352-53. See also *R.* v. *Mullen*, [1968] 1 C.C.C. 320 at 323 (B.C.C.A.).

[73] See Peter K. Williams, *Canadian Criminal Evidence* (Agincourt: Canada Law Book, 1974) at 441.

[74] *D.P.P.* v. *Hester*, *supra*, note 35 at 322, 331 (A.C.); 1071, 1078 (All E.R.); 926, 934 (W.L.R.).

[75] *Supra*, note 52.

[76] *Supra*, note 66.

[77] See the discussion of *D.P.P.* v. *Hester*, *supra*.

[78] Cases in which it has been held or suggested that the unsworn evidence of one child cannot corroborate the unsworn evidence of another child are *R.* v. *Shorten*, [1918] 3 W.W.R. 5; *aff'd* 57 S.C.R. 118; [1918] 3 W.W.R. 9; 49 D.L.R. 591, *per* Lamont J.A. dissenting; *R.* v. *Drew* (*No. 2*), [1933] 2 W.W.R. 243; 60 C.C.C. 229; [1933] 2 W.W.R. 243; 60 C.C.C. 229; [1933] 4 D.L.R. 592 (Sask. C.A.) (*obiter*); *R.* v. *Silverstone* [1934] 1 D.L.R. 726 (C.A.), where counsel apparently did not address themselves to this issue; *Brule* v. *The King*, [1930] 48 Que. K.B. 64; *R.* v. *Mandy and Petrosky* (1950), 98 C.C.C. 240 (B.C.S.C.); *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C.S.C.), a civil case in which the court had to consider the effect of s. 6 of *The Evidence Act*, R.S.B.C. 1948, c. 113 (*obiter*); and *R.* v. *Mullen*, *supra*, note 72, dealing with what is now s. 586 of the *Criminal Code*, R.S.C. 1970, c. C-34.

See also the Australian cases of *R.* v. *Smith*, 26 V.L.R. 683; *Croft* v. *The King* (1917), 19 W.A.L.R. 49; and *Scruby* v. *The Queen* (1953-55), 55 W.A.L.R. 1. In *Scruby* v. *The Queen* it was made clear that corroboration need not be in the form of sworn evidence, that real evidence would be sufficient to corroborate the unsworn evidence of a child.

[79] *Supra*, note 52.

case. The rejection of the doctrine of mutual corroboration in that case has now been overruled. If necessary, it is suggested, that decision can be restricted to the scope of section 16 of the *Canada Evidence Act*.[80] Moreover, as has been suggested above, the language of section 16 as well as the language of section 24 of *The Evidence Act*[81] (N.B.) could be just as readily interpreted to allow mutual corroboration. There has been no real discussion of the language used in section 586 of the *Criminal Code*.[82]

D. LAW REFORM

As I have attempted to point out above, legislative change of the law with respect to whether the unsworn evidence of children may be mutually corroborative is not necessary. An alternative interpretation of the relevant statutory provisions to permit mutual corroboration is available. Moreover, even under the existing law (which is the result of statutory interpretation rather than some general rule of the common law),[83] it may be possible to have the unsworn evidence of one child witness admitted under one statutory provision and other unsworn evidence admitted under another statutory provision if circumstances permit. In this way, utilization of various federal and provincial enactments may achieve the desired result.[84] However, if legislative reform is deemed to be necessary to clear up the existing ambiguities of language in the statutory provisions set out above and others, a number of proposals for reform have already been made.

1. *The Departmental Committee on Sexual Offences against Young Persons (U.K.)*

The Report released by the Committee in 1925, even at that early date, recommended the abolition of the rule prohibiting mutual corroboration in the case of the unsworn evidence of children where the children testify as to different incidents. However, the Committee was not prepared to recommend the abolition of the rule against mutual corroboration in cases where children testify as to the same incident.[85] The Committee was of the opinion that the probability of children of tender years speaking the truth was incomparably greater in the former circumstances than the latter circumstances, and therefore a relaxation of the rule against mutual corroboration in those situations could be justified.

The distinction made by the Committee as to when the unsworn evi-

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[80] R.S.C. 1970, c. E-10.

[81] R.S.N.B. 1973, c. E-11.

[82] R.S.C. 1970, c. C-34.

[83] Recently in *R.* v. *Halligan*, [1973] 2 N.Z.L.R. 158 (C.A.), it was held that there was no general rule that unsworn evidence of one child cannot corroborate the unsworn evidence of another child where the unsworn evidence is admitted by virtue of s. 13 of the *Oaths and Declarations Acts, 1957*.

[84] *Scruby* v. *The Queen, supra*, note 78 at 6. Such an approach would, of course, be subject to constitutional restrictions in Canada.

[85] Glanville Williams, *The Proof of Guilt* (2nd ed., London: Stevens & Sons Ltd., 1958) at 148-149. See also the discussion with respect to similar evidence in *R.* v. *Campbell, supra*, note 40.

dence of children may be mutually corroborative is difficult to support. Certainly, in light of the scientific data available at this time, the need for such differentiation in treatment is not established. In addition, the case law suggests that the distinction is inappropriate.[86]

2. *The Criminal Law Revision Committee, Eleventh Report.*[87]

The Eleventh Report of the Criminal Law Revision Committee has taken the conservative recommendations of the Departmental Committee on Sexual Offences against Young Persons one step further. The Eleventh Report endorses the abolition of the rule prohibiting mutual corroboration in the case of the unsworn evidence of children in all circumstances.

> A rule of this kind may seem logical at first sight, but we do not think it is really so. For corroboration means "independent testimony which affects the accused by connecting or tending to connect him with the crime"; and there seems no reason why the suggested corroborative evidence, being *ex hypothesi* relevant, admissible independent and affecting the accused in the way mentioned, should not be allowed to count as corroboration. The fact that the suggested corroborative evidence, if it stood alone, would have been evidence of which corroboration would have been necessary or desirable is obviously a matter to be taken into consideration in estimating its weight.[88]

The significance of this further step taken by the Criminal Law Revision Committee can only be appreciated when one considers the other recommendations found in the Eleventh Report dealing with the evidence of children. Although the requirement of corroboration or a warning as to the dangers of convicting on the uncorroborated evidence of children is abolished in non-sexual offences,[89] the Committee, because of an overly solicitous attitude to sexual offences, made the following recommendations with respect to corroboration in such cases:

> (a) in cases of complainants fourteen years of age or older (who would be able to give evidence under oath by the terms of the Report) there should be a direction that there is a special need for caution before convicting on such evidence, and
> (b) in cases involving complainants under the age of fourteen (who, pursuant to the recommendation of the Report, would not be able to testify under oath) corroboration should still be required because of the fallibility or susceptibility of the memory of such young children.[90]

The result of this "half-way house" approach of the Criminal Law Revision Committee is that in cases involving children of tender years, sexual offenders will no longer be able to take advantage of the lack of adult apprehension since mutual corroboration will be possible. These criminals, however, will be able to avail themselves of the legal technicalities relating to what may constitute corroboration (a discussion of which is beyond the scope of this paper). Moreover, in light of the available scientific data, the Report's recommendations regarding the age at which children will be allowed to

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[86] See the decision of Lord Goddard in *R.* v. *Campbell, supra,* note 40.

[87] Criminal Law Revision Committee, *Eleventh Report,* (Evidence General), Cmnd. 4991 (1972).

[88] *Id.* at 113-114.

[89] *Id.* at 123.

[90] *Id.* at 116.

testify under oath should be reconsidered. The age of fourteen would appear to be at least two to four years too high since the scientific data suggests the children in grade six (or ten or eleven years old) are in many respects just as reliable as college students. In addition, the attitude of the Committee to sexual offences and the need for corroboration or a warning must be questioned. In the absence of supporting evidence that there is a greater danger in sexual offences because of "sexual neurosis, jealousy, fantasy, spite or a *girl's* refusal to admit that *she* consented to an act of which *she* is now ashamed"[91] [emphasis added], one must wonder whether in fact the male domination of the Committee did not colour the views of the Committee with respect to this subject. The recommendations of the Canada Law Reform Commission, discussed below, are preferable to those of the Criminal Law Revision Committee in this area of the law of evidence.

3. *Ontario Law Reform Commission, Report on the Law of Evidence*[92]

The recommendations of the Ontario Law Reform Commission with respect to the evidence of children can be found in section 3 of its Draft Act:

> (1) Except as provided in sub-sections 2 and 3, every person presented as a witness in a proceeding shall before testifying identify himself and make the following solemn affirmation:
> I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the court.
> (2) Where a child seven years of age and under fourteen is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if, in his opinion, the child is possessed of sufficient intelligence to justify the reception of his evidence, and to determine if he is competent to know the nature and consequences of giving false evidence and to know that it is wrong and where he so finds, he shall permit the child to give evidence upon making the solemn affirmation set out in sub-section 1.
> (3) Where a child who is,
> (a) under seven years of age; or
> (b) seven years of age and under fourteen years, and who does not qualify as a witness under sub-section 2, is presented as a witness in a proceeding, the presiding officer shall conduct an inquiry to determine if in his opinion the child is possessed of sufficient intelligence to justify the reception of his evidence, and understands that he should tell the truth, and where he so finds, he shall permit the child to give evidence upon stating: I promise to tell the truth.
> (4) No case shall be decided upon the evidence of a child who has qualified as a witness under sub-section 3 unless his evidence is corroborated by some other material evidence.

Other than the changes made in connection with the swearing of an oath, the recommendations in section 3, with the exception of some minor modifications, are merely a codification of the existing law. There is nothing in the Report of the Ontario Law Reform Commission to suggest that the question of mutual corroboration concerned the Commission. Section 3(4) of the Draft Act makes no substantial change in the existing law. The problem of interpretation discussed above will continue to occupy the courts should the Draft Act be enacted.

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[91] *Id.* at 113.

[92] Ontario Law Reform Commission, *supra*, note 24.

4. *Canada Law Reform Commission, Report on Evidence*[93]

Perhaps the most promising of the proposals for reform in this area of the law of evidence are found in the Report prepared by the Canada Law Reform Commission. After examining the topic of corroboration thoroughly in Working Paper Eleven, the following sweeping changes were distilled and proposed in the code of evidence:

> 88 For greater certainty, it is hereby provided that
> (b) every rule of law that requires the corroboration of evidence as a basis for a conviction or that requires that the jury be warned of convicting on the basis of uncorroborated evidence is abrogated.

In addition, section 89(b) of the Proposed Code repeals section 586 of the *Criminal Code*.[94] The result of these recommendations and others found in the Report[95] is that any child will be able to give evidence. Furthermore, because of the abrogation of the rules with respect to corroboration, mutual corroboration will no longer present a problem. The basis of the recommendations of the Canada Law Reform Commission is the premise "that juries have the necessary experience and common sense to evaluate the testimony before them, and in doing so, to take into account such matters as its source and the fact that it is supported by other evidence."[96] Moreover, the Report adverts to the lack of evidence which would suggest that jurors or judges are more likely to be misled by the testimony of children. Indeed, as I have attempted to establish, there is evidence to support the proposition that children are almost as capable as witnesses as adults.

E. CONCLUSION

Until quite recently there has been little or no scientific data relating to the reliability of the evidence of young children. The existing scientific information now tends to support the proposition that the evidence of such children is much more reliable than had previously been believed to be the case. Indeed, the data would suggest that such evidence is just as reliable, generally speaking, as the evidence of adults. Moreover, it is difficult to understand why the youthful age alone of a witness should have been a conclusive factor in the past when the testimony of each and every witness is affected by such a great variety of factors, age being merely one such factor.

In light of the recent scientific findings regarding the evidence of young children, policy considerations demand that the unsworn evidence of such children be permitted to be mutually corroborative. The dwindling importance of the oath, the blurring of the tests to determine whether a child is competent to give sworn or unsworn evidence, the unacceptable anomalies of the existing law would all suggest that there should no longer be any differentiation in treatment between sworn and unsworn evidence of children in so far as mutual corroboration is concerned. Neither statutory construction nor case law require that this fictional differentiation between sworn and unsworn evidence of children continue.

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[93] Law Reform Commission of Canada, *supra*, note 19.

[94] R.S.C. 1970, c. C-34.

[95] Law Reform Commission of Canada, *supra*, note 19 at 47.

[96] *Id.* at 108.